Chua Yeow Cher v Tele Dynamics Sdn Bhd

HIGH COURT (KUALA LUMPUR) — ORIGINATING SUMMONS NO R2-25-11 OF 1999
AZMEL J
18 AUGUST 1999

Labour Law *— Employment — Dismissal — Constructive dismissal — Transfer — Employee's income would be less due to transfer — No longer entitled to commission — Whether constructive dismissal — Industrial Relations Act 1967 s 20(1)*

Labour Law *— Employment — Transfer — Employee's income would be less due to transfer — No longer entitled to commission — Whether constructive dismissal — Industrial Relations Act 1967 s 20(1)*

The applicant began his employment with the respondent company as a dealer executive on 2 August 1993 and ever since he was posted at the respondent's Kuala Lumpur office. The applicant was later instructed to be transferred to the Johor Bahru office on a promotion with the post of assistant sales manager effective from 16 October 1996. It was one his terms and conditions of employment that he was liable to be transferred to serve at any of the branches of the respondent's group of companies. The applicant refused the transfer as his overall income would be less than what he was earning as a sales executive. As an assistant sales manager, he would no longer be entitled to earn commission. The applicant also alleged that he had been victimized by the company. The applicant made representations under s 20(1) of the Industrial Relations Act 1967 alleging that he had been constructively dismissed by the respondent. The Industrial Court concluded that the respondent had not dismissed the applicant. The applicant applied for an order of certiorari to quash the award of the Industrial Court and also for an order of mandamus to instruct another division of the Industrial Court to rehear the applicant's complaint.

Held, dismissing the application:
An employer has the power to transfer its employees at its absolute discretion (see p 171H). A ground that an employee would receive less earning if transferred to another place because he would receive less commission or no commission at all is not a valid reason to refuse a transfer. However, an allegation of victimization can be a valid reason to establish mala fide. The burden is on the employee to prove. The applicant had failed to prove it before the Industrial Court (see pp 171I–172A).

[Bahasa Malaysia summary

Pemohon telah memulakan pekerjaan beliau dengan syarikat responden sebagai seorang peniaga eksekutif pada 2 Ogos 1993 dan

A sejak hari itu beliau ditugaskan di pejabat responden di Kuala Lumpur. Pemohon kemudiannya diarah untuk berpindah ke pejabat Johor Bahru dengan kenaikan pangkat berjawatan sebagai seorang penolong pengurus jualan mulai 16 Oktober 1996. Salah satu daripada terma-terma dan syarat-syarat pekerjaan adalah bahawa beliau boleh dipindahkan untuk berkhidmat di mana-mana cawangan
B kumpulan syarikat responden. Pemohon menolak pemindahan tersebut kerana pendapatan keseluruhan beliau akan menjadi kurang daripada apa yang beliau perolehi sebagai seorang peniaga eksekutif. Sebagai seorang penolong pengurus jualan, beliau tidak akan lagi berhak untuk mendapat komisen. Pemohon juga mengatakan bahawa
C beliau telah dijadikan mangsa oleh syarikat tersebut. Pemohon telah membuat representasi di bawah s 20(1) Akta Perhubungan Perusahaan 1967 dengan mengatakan bahawa beliau telah dipecat secara konstruktif oleh responden. Mahkamah Perusahaan memutuskan bahawa responden telah tidak memecat pemohon. Pemohon membuat permohonan untuk satu perintah certiorari untuk
D membatalkan award Mahkamah Perusahaan tersebut dan juga untuk satu perintah mandamus bagi mengarahkan bahagian lain Mahkamah Perusahaan untuk mendengar semula aduan pemohon tersebut.

Diputuskan, menolak permohonan tersebut:

E Seorang majikan mempuanyai kuasa untuk memindahkan pekerja-pekerjanya dengan budi bicara penuh beliau (lihat ms 171H). Satu alasan bahawa seorang pekerja akan menerima pendapatan yang kurang jika dipindahkan ke tempat lain sebab beliau akan menerima komisen yang kurang atau tiada komisen langsung bukan merupakan satu sebab sah untuk menolak satu pemindahan. Walau
F bagaimanapun, satu dakwaan pemangsaan boleh menjadi satu sebab sah untuk membuktikan mala fide. Beban terletak pada pekerja tersebut untuk membuktikannya. Pemohon telah gagal untuk membuktikannya di hadapan Mahkamah Perusahaan (lihat ms 171I–172A).]

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Notes

For cases on transfer of employees, see 8 *Mallal's Digest* (4th Ed, 1999 Reissue) paras 987–989.

H **Legislation referred to**

Industrial Relations Act 1967 s 20(1)

LG Seah (*Lobo & Associates*) for the applicant.
M Shamini (*Ramadass & Associates*) for the respondent.

I **Azmel J**: The applicant began his employment with the respondent company as a dealer executive on 2 August 1993 and ever since he was posted at the respondent's Kuala Lumpur office. By a letter dated 1 October 1996 the applicant was instructed to be transferred to the Johor

Bahru office on a promotion with the post of assistant sales manager effective from 16 October 1996. Being unhappy with the transfer the applicant protested against the transfer; but his protest was rejected by the respondent. This resulted in the applicant writing a letter to the respondent dated 11 October 1996 stating that in the light of the instruction to transfer him to Johor Bahru he no longer wished to continue working with the respondent as he considered himself to have been dismissed. The applicant was of the view that he could not be forced to accept the promotion as the salary he would receive as assistant sales manager would be less than his present earning as sales executive.

Subsequently the applicant made representations to the Industrial Relations Department under s 20(1) of the Industrial Relations Act 1967 alleging that he had been constructively dismissed by the respondent. The matter was then referred to the Industrial Court for an award and it was eventually heard by the Industrial Court. At the conclusion of the hearing the Industrial Court arrived at the conclusion that the respondent had not dismissed the applicant. It was against this award of the Industrial Court that the application was made by the applicant to this court.

The applicant's application was for an order of certiorari to quash the award of the Industrial Court vide Award No 689 of 1998 dated 31 December 1998. In addition he also applied for an order of mandamus to instruct another division of the Industrial Court to rehear the applicant's complaint.

In the applicant's terms and conditions of employment it was clearly stated that one of the terms of the applicant's employment with the respondent company, to which the applicant had unconditionally accepted, was that he was liable to be transferred to serve at any of the branches of the respondent's group of companies at the discretion of the respondent. The relevant para reads as follows:

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> You may be required to serve in any of the departments/branches within Tele Dynamics Group of companies and other subsidiary companies at the discretion of the management. The management also reserves the right to assign you to serve in any area/zone of service at their absolute discretion at any time during your employment with the Company.

From the above para it is clear that the respondent had the absolute discretion to transfer the applicant to any branches of the respondent. The applicant would not have any right to refuse to be transferred once an order of transfer had been issued. However if it can be proved that such order of transfer was mala fide then and then only could the applicant have good reason not to go on transfer.

In this matter the applicant stated that he did not want to be transferred out of the Kuala Lumpur office to Johor Bahru because even though he would be promoted to an assistant sales manager, his overall income would be less than what he was earning as a sales executive. As a sales executive he was earning commission, while as an assistant sales manager, he would no longer be entitled to earn commission. With his commission he received more earning than the salary he would receive as an assistant sales manager.

A It is now trite law that in a reference before the Industrial Court by an employee complaining that he had been constructively dismissed by his employer the burden is on the employee to prove that he had been dismissed unlawfully.

In his letter dated 11 October 1996 the applicant said:

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> It is with regret that I consider myself dismissed by the company in view of the contents of your letter (company's letter dated 8 October 1996). As I see it I cannot be forced to accept a 'promotion' especially when it means a fall in my average earning.

As can be seen from the above the only reason why the applicant refused to C be transferred out was that his income as an assistant sales manager would be less than that of his present earning as sales executive. In my view, this ground cannot be used to allege that the order of transfer of the applicant by the respondent was mala fide. However, at the hearing the applicant made a further allegation that he had been victimized by the company. If this allegation of victimization can be proved then I would agree that the D transfer was not bona fide. The Industrial Court had fully considered this issue as stated in the award:

> The claimant also accused the company of victimization against him due to his refusal to bad mouth Vincent Chia who was his (the claimant's) boss and who had also claimed constructive dismissal. Because of this the claimant had E made a statutory declaration as in CL3 for his protection as claimed by him. The claimant admitted that nothing in CL3 that the company had asked him to bad mouth Vincent Chia and in fact COW1 (General Manager Sales) had praised Vincent Chia as declared by the claimant in CL3. Furthermore what the claimant alleged 'bad mouth' not only it was not pleaded but also it happened about five (5) months before he claimed constructive dismissal which could be considered condonation if, but only if, 'bad mouth' was true. F The company did not only question him but also on other staff in the company as well.

Clearly, the Industrial Court had considered the issue of victimization in the award and had concluded that such allegation had no merit. This is an issue of fact and review court should be very slow in disturbing any decision of G the lower tribunal based on facts unless the decision arrived is very absurd. After having considered the Industrial Court's decision on this issue on victimization I do not find any reason to disturb it. That being the case, the applicant was left with no evidence at all to challenge the order of transfer made by the respondent.

H An employer has the power to transfer its employees at its absolute discretion. An employee can be transferred even though not on a promotion. And the employee has no right to question the right of the employer unless, as has been stated above, the transfer was not bona fide. Sufficient evidence has to be adduced by the employee on a balance of probabilities that his transfer by the employer was not bona fide. A ground I that an employee would receive less earning if transferred to another place because he would receive less commission or no commission at all is not a valid reason. An allegation of victimization, can be a valid reason to establish mala fide. But in an action against constructive dismissal the

burden is on the employee to prove. In this case the applicant had failed to prove it before the Industrial Court.

In this case, the counsel for the applicant alleged that the Industrial Court had committed an error of law and acted on an incorrect basis in fact when it stated in its award:

> Not only is commission not a term in his contract of employment but it could not be implied as it is uncertain and may change from time to time.

As I said earlier, the issue of getting less earning on being transferred out cannot be a valid reason to allege that the order of transfer is mala fide. Even if it is true that the employee would receive less commission or no commission at all after having been transferred to another place, this would not be a valid reason to say that the order of transfer was unlawful because a transfer order can only be regarded as unlawful if it is made with a bad intention.

As I have said the burden of proof lies on the applicant to prove that the order of transfer was mala fide. And on the evidence I agreed completely with the decision of the Industrial Court that the applicant had not proved its case.

As the applicant had failed to prove his case I was of the view that the comments made by the Industrial Court that the applicant applied for a new job would make no difference to the applicant's case. Certainly it cannot be used to reverse the award of the Industrial Court.

Having considered all the circumstances of this case I am fully satisfied that the applicant had failed to establish that the order of transfer made by the respondent on the applicant was mala fide. As such I would completely agree with decision of the Industrial Court that the respondent had not dismissed the applicant.

The application was therefore dismissed with costs.

Application dismissed.

Reported by Benjamin Yong